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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1619

STANFORD T. BAKER, JR.,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The unreported memorandum opinions of the Erie County Court, denying petitioner's motion to suppress evidence, are reproduced in the petition as Appendices B and C. The judgment of conviction, including the order of denial of suppression, was unanimously affirmed by the New York State Supreme Court, Appellate Division, Fourth Judicial Department by order entered June 25th, 1971, reported at 37 A. D. 2d 139. The opinion of the New York State Court of Appeals, unanimously affirming the order of the intermediate appellate court, is reported at 30 N. Y. 2d 252 (March 24th, 1972).

Jurisdiction

Jurisdiction is sought by petitioner pursuant to Title 28, United States Code, Section 1257, Subdivision 3. The order and judgment of the New York State Court of Appeals, the highest state court in which review may be obtained, was entered March 24th, 1972 and entered in the office of the Clerk of Erie County on March 30th, 1972. The petition for a writ of certiorari was docketed in the Supreme Court of the United States on June 14th, 1972. The petition was received by the office of the District Attorney of Erie County on June 8th, 1972.

Question Presented

1. Is a search warrant properly issued upon existing probable cause to believe that a substance known to be contraband will be (has been arranged to be) delivered to specific premises at a specified future time?

Statement

The petitioner, and another,[1] were indicted by an Erie County Court Grand Jury on January 30th, 1970, charged with Criminal Possession of a Dangerous Drug in the Third Degree, a felony, in violation of Section 220.20(b)(ii), Penal Law. A plea of not guilty was entered.

A hearing on the petitioner's motion to suppress evidence was held on April 7th, 1970; decision was reserved. Following the issuance of a memorandum decision of denial, motion for re-argument was made and granted. After re-argument, a further memorandum decision, denying the

[1] The Indictment against the co-defendant was dismissed for insufficiency of evidence before the Grand Jury of that co-defendant's knowing possession.

motion, was issued. Application for further re-hearing was denied. An order denying the motion to suppress evidence was granted on October 14th, 1970.

Thereafter, petitioner moved for inspection of the minutes of the Grand Jury and for dismissal of the Indictment. That motion was denied.

An order transferring the Indictment to the Supreme Court, Erie County, was entered on November 16th, 1970. Trial commenced on November 17th, 1970 and continued through November 24th, 1970 when the jury returned its verdict finding the petitioner guilty of Criminal Possession of a Dangerous Drug in the Sixth Degree, a misdemeanor.

The petitioner was arraigned for sentence on January 12th, 1971: he was fined two hundred and fifty dollars.

Notice of appeal, to the Supreme Court, Appellate Division, Fourth Judicial Department, was timely filed. Pursuant to stipulation between the parties, and approved by a Justice of the New York Supreme Court, the single question on appeal is the propriety of the issuance of the search warrant.

By order of the Supreme Court, Appellate Division, Fourth Judicial Department, the judgment of conviction was unanimously affirmed (37 A. D. 2d 139).

Upon application timely made, an Associate Judge of the Court of Appeals granted leave to appeal to that Court. Notice of appeal was filed thereafter. The order of the Supreme Court, Appellate Division, affirming the judgment of conviction, was unanimously affirmed (30 N. Y. 2d 252). A subsequent motion to amend the remittitur was denied, on the ground that the opinion of the Court indicted that the constitutional argument raised was passed upon.

No question has been raised on the appeal with reference to the facts adduced at trial. The facts surrounding the issuance and execution of the search warrant are as follows:

Vernon Schack, of the Buffalo Police Department Narcotics Bureau, testified that he personally appeared before the Hon. Theodore Kasler, Associate Judge of the City Court of Buffalo on January 9th, 1970, for the purpose of obtaining a search warrant (104-105).[2] He presented an affidavit in support of his application (105). The officer stated that he received information, through a chain of evidence report filed with a postal inspector at the United States Post Office, that one Dewey Dellinger had opened a package in San Francisco (108-109) during the routine performance of his duties, according to Title 19, United States Code 1581-B. The package was re-sealed and forwarded to Buffalo in a registered and locked mail pouch, the lock register being the same when closed in San Francisco as when opened in Buffalo (53). Officer Schack was present when the package was opened in Buffalo, and he examined that package at the Buffalo Post Office on January 6th, 1970 (113). A sample of greenish vegetable material was taken from the package and delivered to the Buffalo Police Laboratory (117) where it was found to be cannabis (119). Officer Schack conducted an investigation and learned, from postal authorities, that Barbara Fay Baker, the addressee on the package, had in the past accepted mail for one Stan Baker, the addressor on the package (122). Officer Schack then received information, from Postal Inspector Ratts, that the package was scheduled for delivery on January 16th, 1970 (124). All of his information was contained in the affidavit sup-

[2] Numerals in parentheses refer to pages of the joint appendix.

porting the officer's application for a search warrant (57-59). The search warrant was issued, on January 9th, 1970, authorizing a search of premises known as 71 Arnold Street, upper apartment, Buffalo, New York (50-52).

Officer Schack arrived in the area of the premises at approximately seven-thirty a. m. on January 16th, 1970 (131, 134), and waited for the arrival of the mail truck (132). The truck arrived at seven-thirty-nine a. m., and delivered the package (134). At seven-fifty-six a. m., the officers rang the doorbell and conducted the search (135).

After the execution of the warrant an inventory was made and the property was returned to the issuing magistrate who directed that the property seized remain in the custody of the Buffalo Police Department, subject to court order (55).

REASONS FOR OPPOSING THE WRIT

POINT ONE

No constitutional or statutory violation occurred through issuance of a search warrant based upon present knowledge of existing probable cause in advance of scheduled receipt of contraband on specified premises.

The proceedings for which review by this Court is now sought originated in the Erie County Court on a motion to suppress evidence seized as a result of a search pursuant to a search warrant. The single question in contention is the propriety of the issuance of the warrant to be executed seven days later—when the property to be seized was arranged to be at the designated premises. There is no argument with reference to the specificity of the premises to be searched, or the certainty that the package scheduled

for delivery contained contraband. There exists no difficulty with the reliability or credibility of the underlying information. There is only the most remote possibility of failure of delivery of the contraband to the premises. There is no evidentiary problem of knowledge or intent with regard to possession, as review has been limited to the single issue of the issuance of the warrant. In the instant matter the New York courts have approved a situation where the police, with strong probable cause to believe that known contraband was scheduled to be delivered to particular premises, presented their information to a detached magistrate and received judicial sanction to search for and seize property the possession of which is unlawful. The New York courts have determined that no state statute was violated by this procedure. The New York courts have determined that no state or federal constitutional provision requires the police to sit back and observe the physical delivery of a package of contraband in transit before applying to a magistrate for authority to seize it, and thereby risking the possibility of removal, destruction or concealment of the contraband. It is submitted that the state determination is logical, reasonable, and in full accord with the decisions of this Court interpreting Fourth Amendment constitutional issues.

The New York Court of Appeals noted particularly that "[N]either the Constitution nor relevant sections of the former Code of Criminal Procedure forbid issuance of a search warrant in advance of the imminent or scheduled receipt of seizable property by the person or at the premises designated in the warrant" (*People v. Glen (Baker)*, 30 N. Y. 2d 252 at 256). In quoting the State Constitution and the identical federal constitutional provision in the Fourth Amendment, the Court observed that it is clear that neither document contains limitations of time or

strictures on present possession with respect to search warrants. Although the usual situation involves probable cause determined on the basis of past (and presumably continuing) crimes, there is no reason to disallow a finding of probable cause on future and virtually certain continuing physical possession of contraband. Unlike the situation of a warrantless search incident to arrest, there is no requirement that a crime be completed before a search warrant may be issued. The opinions below, then, are in no way in conflict with previously announced constitutional guarantees.

Nor did the New York courts decide this matter in a manner not in accord with other applicable decisions of this Court. The decision below turned, ultimately, on whether a prospective warrant, by not being sufficiently limited, might allow an unreasonable search through the involvement of some discretion with the executing officer. Applying proper constitutional principles, the Court found no such danger: there is always some discretion vested in the officer which can be controlled by invocation of the exclusionary rule upon the appropriate motion; the danger of non-occurrence of one fact contributing to probable cause is greater in the usual case of past criminal activity than in the instant case where the element of delivery is a readily apparent fact. The Court below emphasized the need for great strength in the supporting evidence for a prospective warrant, thus demonstrating full appreciation of this Court's decisions in the area and following them to the point of even greater stringency.

Although the cases are legion where a present or past crime is the basis for issuance of a search warrant, they are not here controlling as there is no present crime involved in the instant matter. The search warrant was not

based on the possibility of the future crime of possession but on existing facts establishing probable cause to believe that a substance tested and proved to be contraband would be delivered by United States postal authorities to 71 Arnold Street on January 16th, 1970. Because of the singular circumstance of advance information in this matter, the police followed the constitutionally sanctioned better procedure of obtaining judicial sanction for their search, rather than entering the premises without a warrant, after delivery, in the hopes that the occupants of the house would be "knowingly" possessing the illegal contents of the package. To require that the search warrant be issued only after the package was delivered as arranged would be to place formalistic restrictions on police activity. In upholding the warrant in the instant case the New York courts applied the rule consistently stated by this Court, that searches under a warrant be accorded preference over warrantless searches, even in doubtful or marginal cases, as they are to be interpreted in a commonsense and realistic fashion rather than a hypertechnical manner (*United States v. Ventrusca*, 380 U. S. 102; *Aguilar v. State of Texas*, 378 U. S. 108; *Jones v. United States*, 362 U. S. 257; *Johnson v. United States*, 333 U. S. 10; *Chapman v. United States*, 365 U. S. 610). That determination should not now be overruled.

Conclusion

Review by this Court is not required in the instant case where the state courts have upheld a search conducted pursuant to a search warrant issued upon existing facts constituting probable cause to believe that known contraband would be delivered to specified premises at an arranged future time. The decision of the state courts is in full accord with constitutional principles and the interpretation of those principles by this Court.

The writ of certiorari applied for should be denied.

Respectfully submitted,

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Dated: June 22nd, 1972.